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IN THE

Supreme Court of the United States

October Term, 1945.

No. 147

WADE H. COOPER, *Petitioner,*

v.

R. C. PARSONS, Receiver of The United States Savings Bank, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF.

WADE H. COOPER, *Pro Se,*
University Club,
Washington, D. C.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.
CHARLES W. WARDEN, WASHINGTON REPRESENTATIVE,
TOWER BUILDING

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October Term, 1945.

No. .....

WADE H. COOPER, *Petitioner,*

v.

R. C. PARSONS, Receiver of The United States Savings Bank, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

To the Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Petitioner, Wade H. Cooper, counterclaimant in the District Court of the United States for the District of Columbia, and Appellant in the United States Court of Appeals for the District of Columbia, respectfully prays that a writ of certiorari be issued to review a judgment of the said United States Court of Appeals for the District of Columbia, entered in this cause on March 12, 1945, affirming a judgment of the District Court of the United States for the District of Columbia, denying a motion by Petitioner as counterclaimant, for a summary judgment and granting a motion of Respondent as Plaintiff in the said District Court,

for a summary judgment. Petitioner, as Appellant in the said United States Court of Appeals, filed a Petition for a rehearing on March 24, 1945, which Petition was denied by said Court of Appeals on April 6, 1945.

This case grows out of the arbitrary suspension and liquidation of the United States Savings Bank, admittedly four times solvent, organized in 1906 under the laws of the State of West Virginia, with a capital stock of $100,000. of 1000 shares of $100.00 each, with its principal place of business at 14th & You Streets, Northwest, Washington, D. C. A conservator was placed in said bank on March 14th, 1933, following the bank moratorium of President Roosevelt on March 6, 1933. On February 10, 1934, former Comptroller J. F. T. O'Connor appointed a receiver for said Bank, which, in a composite period of 13 months (payment dates, R. p. 3), paid 100 per cent on the dollar and still has left over a surplus of $175,000, after a dissipation in alleged expenses of $235,000. The Bank was four times solvent as shown by the records, as the result of the self-denial of the stockholders in building up a surplus of twenty times the amount required by law (which was only 20% of the capital stock of $100,000), in order to protect the depositors and save the possibility of an assessment. The question finally to be determined is as to who is the owner of this surplus of $175,000, the stockholders or depositors; but this determination is dependent upon a number of other questions, subject to review by this Court, as set out in the Record in the substituted counterclaim (R. pp. 3-11), including the effect of *ultra vires* acts of the Bank, the rate of interest, if any, to be paid under the District law, and the effect of the arbitrary acts of the former Comptroller.

Opinion and Judgment Below.

The judgment and opinion of the District Court of the United States for the District of Columbia are printed in

the record or Appendix (R. 39 and 45 respectively). The judgment of the District Court was affirmed on March 12, 1945 by the Court of Appeals upon the opinion of Mr. Justice Letts of said District Court, the Court of Appeals not writing any opinion of its own.

Statement of the Case.

Carter B. Keene, first Receiver of the Savings Bank, refused to sue the stockholders upon the ground that the Bank was perfectly solvent, but he was later "permitted" to resign, and Receiver Young, predecessor of Respondent Parsons, on August 10, 1937 sued Petitioner and all other stockholders of the Bank for $100,000. assessment. On January 23, 1939 an amended bill was filed by the Receiver charging that 100 per cent had been paid on the principal of the depositors, but that interest was due amounting to the sum of $223,000, later admitted by Respondent to be approximately $204,000. Petitioner and the other stockholders contested this claim for interest for various reasons, and charged that the Bank was arbitrarily liquidated, citing facts and acts to sustain this latter charge. Different appeals were taken to the Court of Appeals by one side or the other until November 1943, when the minority stockholders agreed to settle by the payment of $13.25 per share, all the money to be restored if it should finally be determined that the Receiver was not entitled to the money or that it was not needed. On February 14, 1944, Petitioner Cooper, owner of 560 shares of the bank stock accepted the same proposition, with the understanding that he was not surrendering any rights and should have the right to have all questions in issue determined by the Courts (R. pp. 52, 53). Thereupon, on April 6, 1944, this substituted counterclaim was filed (R. 3-11).

Following the filing of this counterclaim, Respondent, on April 11, 1944, moved to strike certain portions of same,

which motion was granted on April 21, 1944 (R. p. 15). On April 28, 1944, Respondent filed answer to the remaining charges (R. p. 15). On May 4, 1944, Petitioner filed his motion for summary judgment (R. p. 27). On May 12, 1944, Respondent made his motion for a summary judgment, which was granted on June 23, 1944, and the motion of Petitioner denied (R. p. 45).

Basis of Ruling.

While the Court of Appeals did not deliver any written opinion, it adopted the opinion of the District Court (Mr. Justice Letts), and affirmed the judgment upon that opinion, as already stated (R. p. 39).

Questions Presented.

The questions involved in this proceeding are:

1. Whether the Savings Bank in the instant case is liable for its *ultra vires* acts.
2. Whether Petitioner is *estopped* as an officer and stockholder of the Bank from relying upon the *ultra vires* acts of the Bank.
3. Whether the law of the District of Columbia controls the rate of interest, if any, to be paid, or the law of New Jersey, Oregon, or some other State.
4. Whether the interest law of the District of Columbia was properly interpreted, construed and applied by the lower courts.
5. Whether the Savings Bank in the instant case is liable for interest at all, and if so, what rate under the law of the District of Columbia, and for what period.
6. Whether the failure of the Savings Bank to pay the principal, on account of the intervention of the law, constitutes a "forbearance" on the part of the depositors, or is simply a past due debt.
7. Whether the stockholders should be subrogated to the rights, if any, of the depositors, for denying them-

selves dividends to the extent of twenty times the amount required by law for surplus, thereby enabling the depositors to receive 100 per cent, in the face of a dissipation of $235,000. in alleged expenses.

8. Whether the Savings Bank is liable for $96,000. wasted since this "nuisance" assessment suit was instituted, and whether the Bank is liable for the $50,000. lost as a result of the negligence of the former Comptroller in failing to pay taxes and collect interest; and whether the Bank is liable for the arbitrary refusal of the former Comptroller to convert the assets into cash and disburse the proceeds, according to law, and if the Bank is liable for his arbitrary refusal to disburse the cash even when he had it on hand.

9. Whether Petitioner is entitled to a trial on its merits upon the acts and the facts stated in the substituted counterclaim, showing that the said Savings Bank was arbitrarily or fraudulently suspended and liquidated, and whether the lower courts violated the due process clause of the Fifth Amendment to the Constitution of the United States in refusing Petitioner a trial on its merits and in refusing him a fair and impartial trial, and violated Article 1, Sec. 10, Clause 6 of the said Constitution prohibiting the impairment of the obligation of contracts.

Jurisdictional Questions.

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended, which provides that the Supreme Court of the United States may hear and determine any case, civil or criminal, in a Circuit Court of Appeals or in the Court of Appeals of the District of Columbia, and may require by certiorari that the cause be certified for such determination. The jurisdiction of this Court is invoked to hear and determine the questions presented, because,—

(a) Questions 1 & 2 are questions where the United States Court of Appeals of the District of Columbia has held that the said Savings Bank has not committed any *ultra vires* acts, contrary to the law; and

(b) That Petitioner Cooper is estopped from relying upon the same, as he was paid dividends during the period of the commission of the *ultra vires* acts, contrary to applicable decisions of this Court, and also contrary to former applicable decisions of said Court of Appeals.

(c) The said Court of Appeals has agreed that the law of the District of Columbia should control as to the interest rate, but proceeded in direct violation of the law to increase the rate of interest to 6%, following suggested interest rates in New Jersey, Oregon and elsewhere.

(d) The said Court of Appeals has not given proper effect to applicable decisions of this Court regarding interest rates in the District of Columbia, but has doubled the contract rate in direct violation of the law.

(e) The said Court of Appeals has held that the Savings Bank is liable for interest during the period of the Conservatorship, though that was for the arbitrary purpose of promoting the organization of another bank by the Comptroller.

(f) The said Court of Appeals has held, contrary to the applicable decisions of this Court, that the intervention of the law (the Comptroller) constitutes a "forbearance" on the part of the depositors.

(g) The said Court of Appeals has in effect held, contrary to equity and good conscience, that the stockholders cannot be subrogated to the rights of the depositors, if any, regardless of the fact that they denied themselves dividends to the extent of twenty times the amount required by law, to protect the depositors. This is a question of general importance which should be determined by this Court.

(h) The said Court of Appeals has held that the wasting of $150,000. by the former Comptroller is immaterial and irrelevant and that the Bank and its stockholders are liable to the full amount, regardless of the arbitrary and wasteful negligence of the former Comptroller. This is a question of general importance and should be determined by this Court, as well as the liability of the Bank and its stockholders for the arbitrary refusal of the Comptroller to convert the assets into cash and disburse the same.

(i) The said Court of Appeals has held that the acts showing that said Bank was arbitrarily and fraudulently suspended and liquidated are immaterial, irrelevant and *res adjudicata*, though not a single fact was singled out as having ever been passed upon or considered on its merits, contrary to applicable decisions of this Court, and, in effect, that such arbitrary action was not a violation of the due process clause of the Fifth Amendment to the Constitution of the United States; and that increasing the contract interest rate was not a violation of Article 1, Sec. 10, Clause 6 of the said Constitution prohibiting the impairment of the obligations of contracts. All these are questions of general importance and should be determined by this Court.

Assignment of Errors.

The United States Court of Appeals erred:

1. In holding that the said Savings Bank had not committed any *ultra vires* acts, contrary to the law;

2. In holding that Petitioner was estopped to rely upon the *ultra vires* acts of said Bank;

3. In holding in direct violation of the District of Columbia law that the rate of interest to be paid by the Savings Bank in the instant case is 6%, instead of the rate agreed upon by contract;

4. In holding, contrary to applicable decisions of this Court, that the Savings Bank is required to pay 6% interest, instead of the contract rate;

5. In holding that the Savings Bank is liable for interest during the period of the conservatorship, though it was for the arbitrary act of promoting the organization of another bank;

6. In holding, contrary to applicable decisions, that the said Savings Bank is liable for interest during the conservatorship, though this was the intervention of the law;

7. In holding that the stockholders should not be subrogated to the rights of the depositors, if any, though the

stockholders denied themselves twenty times the amount required by law, for the protection of the depositors;

8. In holding that the negligent wasting of assets to the extent of $150,000. is a liability of the Bank and its stockholders; and in holding the Bank and its stockholders liable for the arbitrary refusal of the former Comptroller to convert the assets into cash and disburse the same, and in arbitrarily refusing to disburse the cash even when in hand;

9. In holding that the acts and the facts showing that the said Savings Bank was arbitrarily and fraudulently suspended and liquidated were immaterial, irrelevant and *res adjudicata*, contrary to applicable decisions of this Court; and, also, contrary to the due process clause of the Fifth Amendment; and that increasing the interest rate, in violation of the contracts, was not an impairment of the obligations of a contract, as prohibited by Article 1, Sec. 10, Clause 6 of the Constitution of the United States.

Prayer.

WHEREFORE, Petitioner Wade H. Cooper prays the allowance of a writ of certiorari to the United States Court of Appeals of the District of Columbia in this cause, there entitled Wade H. Cooper, Appellant v. R. C. Parsons, Receiver, Appellee, No. 8872; that said cause may be reviewed and determined in this Court; and that the judgment of the said Court of Appeals may be reversed and set aside; and for such other and further relief in the premises as this Court may deem meet and proper.

WADE H. COOPER,
Petitioner.

District of Columbia, ss.:

WADE H. COOPER, being first duly sworn on oath, deposes and says that he is the Petitioner named in the foregoing Petition; that he has read the said Petition and knows the contents thereof; and the same is true to the best of his knowledge, information and belief.

WADE H. COOPER.

Sworn to and subscribed before me
this....day of June, 1945.

.....,
Notary Public.

BRIEF AND ARGUMENT.

Ultra Vires Acts.

We have not attempted to go into all the details and ramifications from the beginning of this litigation in 1937, but only a concise statement emphasizing the points at issue, the first of which is the question of *ultra vires* acts of the Saving Bank following the passage of a law by the Legislature of West Virginia prohibiting any West Virginia bank from engaging in business at any place other than its principal office in the State of West Virginia, which reads as follows:

> "No banking institution chartered and authorized to engage in business under the laws of this State, shall hereafter install or maintain any branch bank, or engage in business at any place other than at its principal office in the State of West Virginia; or engage in any business other than authorized in this article." Sec. 3131, 1932 W. Va. Code, Act of Feb. 28, 1929.

Mr. Justice Letts in his opinion, adopted by the Court of Appeals, stated that this statute did not apply to the Savings Bank in the instant case,

> "legally incorporated in West Virginia for the express purpose of conducting its banking business *solely* in the District of Columbia. The United States Savings Bank was not engaged in business under the laws of West Virginia." (R. p. 41.)

The Charter of the Savings Bank does not restrict it to engaging in business "solely" in the District of Columbia, but only identifies its principal office at that place (R. p. 1) and specifically says "chartered and authorized to engage in business *under the laws* of this State," which seems to be plain enough. The bank was subject to the supervision and examination of the Comptroller of the Currency, but under the laws of its Creator, the State of West Virginia. See the leading case of Relf vs. Runkle, 103 U. S. 529, holding that the law of the State to which the Corporation owes

its existence is the law of its existence. Hamilton vs. Bergling 66 App. D. C. 85 F. (2nd) 249. Bergling vs. Wardell (1940) 73 App. D. C. 61, 115 F. (2nd) 948. The Court of Appeals in this instance reversed its position as well as the position of this Court, but refused to assign any reason for its action. Certainly the Comptroller could not issue a charter to a State Bank, as the implication seems to be here. The Court of Appeals held that the act of Feb. 24, 1937, repealing or modifying the prohibitory act of 1929 shows that the act of 1929 *supra* did not apply to the Savings Bank in the instant case. The repealing or modifying act reads as follows:

> "* * * The officers and directors of such non-resident banking institutions may conduct the banking business at such place or places outside of the State of West Virginia as they may be permitted under the laws of the jurisdiction in which such place or places are situated. The restrictions in the banking laws of this State contained as to establishment and maintenance of branch banks shall not be applicable to said non-resident banks, but no non-resident bank shall operate or maintain any branch in this State." Sec. 3224, 1937 W. Va. Code, Act of Feb. 4, 1937.

This later repealing act did not refer to the Bank in the instant case, as the bank was suspended Feb. 10, 1934, or three years prior to the passage of the latter act in 1937. Here it is pertinent to inquire for the reason of modifying the act of 1929, unless it did apply to non-resident going banks. Were the legislators repealing or modifying something not in existence?

The Respondent insists that the title of the act of 1929 shows that the act did not apply to non-resident banks. The title was likely supplied by some engrossing or enrolling clerk. There is nothing in the face of the Statute designating the name of the bill. The title embraces several subjects, as follows:

> "Branch Banks Forbidden; Bank Not to Sign Indemnity Contract or Pledge Its Assets to Indemnify

> a Surety; Exception as to Guarantee of Federal Deposits or State and Divisions Thereof."

Could a clerk render a bill void by failure to embrace every subject in the title? According to authorities he could not.

> "The title is no part of an act and cannot enlarge or confer powers, or control the words of the act unless they are doubtfull or ambiguous. The ambiguity must be in the context and not in the title to render the latter of any avail." (Cornell vs. Coyne (1904) 192 U. S. 418, 430 and cases cited.)

ESTOPPEL. The Court of Appeals held that Petitioner Cooper was estopped to rely upon the *ultra vires* acts of the Savings Bank, contrary to its previous holding in Dunn vs. O'Connor, *et al.* (1937) 67 App. D. C. 83, that:

> "* * * there can be no doubt that the debts * * * created *ultra vires* the corporation, the stockholders of the Continental have an interest entitling them to maintain suit."

The Court of Appeals has also held in Thompson vs. Park Savings Bank, 64 App. D. C. 308, 77 F. (2nd) 955 (1935) that following the expiration of the charter of the bank that

> "Therefore they (the depositors) are estopped to claim the legality of the bank's actions and cannot hold the directors or stockholders liable individually or as partners"

In both these cases the stockholders received dividends right along, as in the instant case, a 100 per cent dividend, as the record shows having been paid by the Park Savings Bank on one occasion. Why did the Court of Appeals reverse itself in the instant case? No reason was assigned. Petitioner was only receiving dividends of 6, 7 or 8 per cent on the Capital stock, and the surplus, which he and the other stockholders had created by their self-denial. Of course, it has a melodious sound to speak of 30 or 40 per cent on the capital, but it was the result of a created surplus.

Equity, of course, will not permit one to rely upon his own wrongful act. But there is no suggestion of wrong in the instant case.

> "The object of a prohibitory law (as here) cannot be defeated by estoppel nor the legally impossible accomplished." C. J. 1228 Annotations.
>
> "A contract made by a Corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the doctrine of estoppel." Union Pac. R. R. Co. vs. Chicago R. I. & P. R. R. Co. 163 U. S. 564.

A leading case is the Central Transportation Company vs. Pullman's Palace Car Co. 139 U. S. 24, 35 L. Ed. 55 where the Supreme Court stated:

> "But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped by assenting to it, or by acting upon it, to show that it was prohibited by those laws."
>
> "* * * that if the contract is prohibited by statute every one dealing with the corporation is bound to take notice of the restrictions in its charter." First National Bank vs. Converse 175 U. S. Page 40.

It will therefore be seen that the Court of Appeals has not only repudiated its own decisions, in the instant case, but has also refused to follow applicable decisions of this Court.

DIVIDENDS. Respondent insists that Petitioner should be denied any right to the surplus left, after the payment of a 100 per cent, as he received large dividends for a time, but there is no credit given for the long denial of dividends in order to create a surplus equivalent to twenty times the amount required by the law of West Virginia, which was only 20 per cent against a Capital of $100,000.00.

> "The Directors of any bank may annually, semi-annually or quarterly declare dividends, but such bank shall, before the declaration of any dividend, carry one tenth part of the net profit accrued to its surplus fund until the same shall amount to twenty percentum of its capital stock." Barnes Code, W. Va. 1923 Acts 1913, Ch. 21.

Unless this surplus had been created the depositors would never have received a 100 per cent (R. p. 4) in view of the dissipation of $235,000. (R. p. 4) in this Receivership. We have already shown that the receipt of dividends does not estop Petitioner from maintaining this action. To penalize Petitioner for receipt of dividends is tantamount to penalizing him for operating a sound and solvent bank. In the old case of Brant vs. Virginia Coal and Iron Co., 93 U. S. 326, 335, 23 L. Ed. 927 this Court said:

> "It is difficult to see where the doctrine of estoppel comes in here. In the application of the doctrine there must generally be some intended deception in the conduct or declaration of the party to be estopped."

No such claim is made in this instance. The cases cited by the lower courts are easily distinguishable from the instant case.

Rate of Interest, if any.

For this discussion we are assuming, contrary to the law and the facts, that the savings bank was insolvent and that it was suspended on Feb. 10, 1934, in good faith. The question of good faith we will discuss later.

On March 1, 1901, the Congress of the United States enacted into law the following two sections (Code of 1940) regulating the interest rate to be paid by all persons, firms and corporations in the District of Columbia:

> "The rate of interest in the District upon the loan or forbearance of any money, goods or things in action, and the rate to be allowed in judgments and decrees, in the absence of express contract as to such rate of interest, shall be six dollars upon one hundred dollars for one year and at that rate for a greater or less sum or for a longer or shorter time; * * *" 28-2701 D. C. Code of 1940, Title 17, 1, 1929 Code (Act of March 3, 1901, 31 Stat. 1377, Ch. 854).
>
> "In an action in the District Court of the United States for the District of Columbia to recover a liquidated debt on which interest is payable by contract or by law or

> usage, the judgment for the plaintiff shall include interest on the principal debt from the time when it was due and payable at the rate fixed by the contract, if any, until paid." 28-2707 of D. C. Code 1940 and Title 17 Ch. 1. Sec. 7 of 1929 Code (Act of March 3, 1901, 31 Stat. 1377, Ch. 854, 1184.)

Regardless of what the rate was *prior* to the passage of the above two sections, these two sections clearly control the interest question in the District at present. This is agreed to by Respondent as well as the Court of Appeals (R. P. 44) but both the District Court and the Court of Appeals proceeded to utterly destroy the plain meaning and intent made clear by plain words, of both of the above sections. Petitioner did not insist that the law of West Virginia controlled the interest rate, as stated by Mr. Justice Letts, but that the District law controlled, as embraced in the two sections above mentioned. The law of West Virginia required the contract rate before and after maturity, as stated in Pierpont vs. Pierpont, Admr., 71 West Va., 431 (1912) where the Court said:

> "Interest being the subject of contract, our cases hold that where interest is contracted for at less than the legal rate, that rate will control after maturity and judgment as well as before."

In Morris vs. Bear, 72 West Va., 1, 78 SE 371 the Supreme Court said:

> "It is error to decree interest at 6% when the agreed rate is less."

This was also the law of Virginia, Brooks vs. Roane, 1 Call (Va.) 205; Bent vs. Patten, 1 Rand (Va.) 25.

In the case of Hoffman vs. Unger, a West Virginia case, (1943) (24 S. E. 2nd 911) referred to by Mr. Justice Letts, the Supreme Court *did* declare, the first time in the history of the State, that the depositors were entitled to interest, but there was no change in the rate or in the law, as stated in the two West Virginia cases to which reference has just been made, as this Court will see from a reading of the

concurring opinion. But in the instant case both the lower Courts increased the interest rate on demand or commercial deposits to 6 per cent when the contract admittedly provided that no interest would be paid; and on savings or time deposits the lower Courts doubled the contract rate of 3 per cent, increasing it to 6 per cent, utterly disregarding both contracts and the plain meaning of the District law as embraced in the two sections of the D. C. Code of 1940, a careful examination of which shows that the District law is practically the same as the West Virginia law, as the contract rate prevails *before* and *after* maturity in the District and in the State of West Virginia. Sec. 28-2701 of the D. C. Code provides for interest at the rate of 6 per cent "in the absence of express contract as to such rate of interest". If the Congress meant that the rate would be 6 per cent regardless of the contract, then why say "in the absence of a contract"? The meaning is clear that the contract rate, whether it be nothing or one or two per cent, is to prevail, before and after maturity, when Sec. 28-2701 is read in connection with Sec. 28-2707, which declares:

> "the judgment (after maturity) shall include interest on the principal debt from the time when it was due and payable at the rate fixed by the *contract,* if any, until paid."

Judgments are obtained after and not before maturity, as the lower Courts well understood, but disregarded entirely the District law and followed decisions of the Courts in New Jersey and Oregon and elsewhere, though this Court has held that the law of the District controls.

In R. R. Co. vs. Harman, 147 U. S. 290, Chief Justice Fuller said:

> "Whatever the law of the District of Columbia is, upon the subject of interest controls, of course".

He further stated:

> "It is conceded that at Common law, judgments, whatever the cause of action, did not bear interest."

This declaration is confirmed by all the English cases. In the case of Colton vs. Bragg, 15 East 226, 227, Vol. 14 of English Ruling Cases, Anno. (1916) P. 543, Lord Ellenborough, Ch. J. said:

> "* * * Lord Mansfield sat here for upwards of thirty years, Lord Kenyon for above thirteen years, and I have now sat here for more than nine years, and during all this time, no case has occurred where, upon a mere simple contract of lending, without an agreement for the payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, from whence a contract for interest was to be inferred, has been ever given."

In the instant case there was no contract, express or implied, to pay interest on the demand deposits, but a positive contract that no interest would be paid. (R. p. 27.)

In the English case of Cook vs. Fowler, L. R. 7 H. L. 36, 37, reported in Vol. 14 of English ruling cases Anno. (1916) p. 555, the borrower had agreed to pay 5% per month on 1330 pounds. The borrower died before the month passed. The lender kept quiet for four years and then insisted upon 5% per month for four years. The House of Lords affirmed the action of the lower court in allowing 5% per annum and not per month, Lord Hatherly saying:

> "* * * or they (the Jury) may even allow nothing in case they are of opinion that the delay of payment has been occasioned by the default of the holder, that is, the holder of the instrument".

Lord Selborne said:

> "I entirely agree in the motion which my noble and learned friend upon the woolsack has submitted to your Lordships."

Sections 28-2701 and 28-2707 were likely passed to prevent debtors in distress (as here) from being oppressed by creditors in the manner above outlined.

We again challenge opposing Counsel, as we did below, to produce one single case in the entire history of the District where the contract rate was ever increased by the

Courts before or after maturity. And we challenge Counsel to produce one single case where interest was ever allowed when the contract was to the effect that no interest would be received or paid. The Bank in the instant case was simply borrowing and re-lending. If the Savings Bank borrowed $500,000. from New York at 3% and was in default six months, would this Court increase the rate of interest to 6% in case of suit? Certainly not. There is no such case.

Setion 28-2701 *supra* is practically a reproduction of the act of 1870 as discussed by Chief Justice Fuller in R. R. Co. vs. Harman *supra,* where he said:

> "* * * but the Act does not say they shall bear interest in the future, if they did not in the past" * * * "Judgments and decrees as well as the loan or forbearance money, goods or things in action are referred to, but the Act does not say they shall bear interest in the future if they did not in the past. * * *"
>
> "There is nothing to indicate a legislative intention to declare that *all judgments* and decrees should thereafterwards bear interest by virtue of the Statute, or to make any change in that respect. * * * Judgments bore interest in actions *founded on contract* as provided by the Act of 1812". (Italics supplied.)

In Pierce vs. U. S. 255 U. S. 704 (1921) Mr. Justice Brandeis said:

> "At Common Law judgments do not bear interest; interest rests solely upon statutory provisions," citing cases.

This Court has already defined or interpreted Section 28-2701 *supra* in the case of R. R. Co. vs. Harman *supra* for Section 28-2701 is simply a continuation of the Act of 1870 referred to by Chief Justice Fuller. For the convenience of the Court we here reproduce the Statute of 1870, being sec. 713 of the Act of 1870.

> "The rate of interest upon judgments or decrees, and upon the loan or forbearance of any money, goods or things in action, shall continue to be six dollars upon one hundred dollars for one year, and after that rate

for a greater or less sum, or for a longer or shorter time, except as provided in this chapter." Sec. 28-2701 did not change the law requiring a contract for interest, though the rate may be omitted.

A comparison will show that there is no difference whatever in the two sections. Richards vs. Bippus, 18 App. D. C. 293 is relied upon by Respondent as being *persuasive* "although decided just prior to the enactment of the above noted Code provision", (28-2701). But this was simply the reduction of the interest rate from 10 per cent to 6 per cent, the legal rate. No case has been found where the Court increased the contract rate. Any statement to the contrary in Richards vs. Bippus *supra* was not even dictum, but merely mistaken observation. In Stewart vs. Barnes 154 U. S. 456, this Court declared in emphatic language that the failure to demand interest upon payment of principal was equivalent to the waiver of interest. Of course pending the payment of principal a demand would be useless and worthless, but upon payment of principal, interest should be demanded or waived as stated in Stewart vs. Barnes, *supra,* and, also as stated in Kimball vs. Williams (1910) 36 App. D. C. 43, which holds that "acceptance of principal presumes waiver of interest."

FORBEARANCE. Mr. Justice Letts, in his opinion (R. p. 44) says that the suspension of the bank constituted an "actual and unqualified" forbearance of the claims of all depositors. The authorities are all to the contrary. There is a vast difference between a default and a forbearance. Forbearance is the result of an agreement, as stated in Words and Phrases, Vol. 17, pp. 231, 232, Perm. Ed. 1940.

"To establish legal contract to forbear, there must be allegation and proof of request and promise to forbear * * * forbearance being a delay in enforcing rights." Shaw vs. Philbrick, 151 A. 423, 425, 129 Me. 259, 74 A. L. R. 290.

"Forbearance in the legal sense of the word, is an engagement which ties up the hands of the creditor. It

is an act of the creditor (not the law) depriving himself by something obligatory of the power to sue." Reynolds vs. Ward, N. Y. 5 Wend. 501, 504.

"The forbearance of giving time for the payment of a debt is in substance a loan." Diercks vs. Kennedy, 16 N. J. Eq. (1 C. E. Green) 210, 211, Citing numerous cases.

It is doubtful if any bank in the country ever increases the interest rate on paper in default or past due. Let opposing Counsel name one. This court in 1879 in the case of Holden vs. Trust Co. 100 U. S. 72, 25 L. Ed. 567 made the observation that the custom in the District was to allow the legal rate after maturity, but not one single case can be found to sustain that mistaken observation. Anyway this was in 1879 or long prior to the contrary opinion of this Court in 1893, as delivered by Chief Justice Fuller in R. R. Co. vs. Harman 147 U. S. 290, *supra*, which should control here.

CONSERVATORSHIP. The former Comptroller arbitrarily held the Bank in the hands of a Conservator for eleven months using it to promote the organization of another bank (R. p. 5) instead of liquidating it, if he honestly believed it insolvent. The Bank should be purged of all interest for this period.

"The running of interest is suspended where payment is prevented by operation of law," Vol. 7, p. 226, Enc. U. S. Sup. Ct. Reports 1910.

"It would be manifestly unjust to exact interest as compensation, or damages, when the payment of the debt was interdicted", Brown vs. Hiatts, 15 Wall 177, 185. 21 L. Ed. 128.

"It does not appear reasonable that a decree • • •, ought to direct interest to be paid on the money which that injunction restrained the defendant from using", Osborne vs. U. S., 9 Wheat. 738, 837, 6 L. Ed, 204, (no interest was allowed).

"• • • Interest is not allowed on the claims against the funds. The delay in distribuition is the act of the law; it is a necessary incident to the settlement of the estate," Thomas vs. Western Car Co., 149 U. S. 95, 116, 37 L. Ed. 663.

Why should an exception be made in the case of any bank?

The highest rate on savings by banks in the District is one per cent (R. p. 55). But the lower Court without a line of evidence increased the rate in the instant case to six per cent or six times the prevailing rate, which would seem to be so unfair as to shock the conscience of any fair and impartial mind, especially after a dissipation of $235,000., and after the stockholders denied themselves twenty times the amount required by law, in order to protect the depositors.

SUBROGATION. Here it would seem that the doctrine of subrogation could very properly intervene in order that perfect justice could be done.

> "It was invented and applied in order to do justice and prevent an injustice being done in a particular case and under a particular state of facts where the law is powerless in the premises", Probst vs. Wigginton, 281 U. S. 834, 213 Ky. 610; Arlington State Bank vs. Paulson, 78 N. W. 303, 57 Nebraska 707, 747 (Rev. on other grounds, 80 N. W. 263, 59 Neb. 94).
>
> "It is applied to subserve the ends of justice, to do equity in the particular case under consideration, and to prevent fraud" (C. J. 60, p. 698, citing authorities).
>
> "Its basis is the doing of complete, essential and perfect justice between all parties without regard to form," (C. J. 60, p. 699).

As the stockholders denied themselves dividends for years in creating a surplus for the protection of the depositors, twenty times the amount required by law, as already shown, why would it not be fair and equitable to subrogate them to the rights, if any, of the depositors or to such extent as seems fair and just, instead of penalizing them six times the amount of loss, if any, plus a "nuisance" assessment suit or by waste?

EQUITY. In 1937 the Legislature of West Virginia (House Bill No. 400, Chap. 10) passed an Act amending

Article 8, Ch. 31 of the Code of West Virginia, by adding thereto Sec. 32(b) providing:

> "* * * that in the administration by receivers of the assets of insolvent banking institutions having deposits of moneys belonging to the State of West Virginia, no greater rate of interest shall be paid on such deposits than that paid for the same period or periods on the same class or classes of deposits by solvent banking institutions, operating in the usual course of business."

This Act applies to both State and National Banks, and was passed to prevent an injustice being done. This Court, the highest Court in the land, should not permit such an *unfair practice* as requiring a bank in liquidation to pay six times the prevailing rate or double the contract rate either as interest or damages without evidence as such a pronouncement is contrary to equity and good conscience, contrary to natural law and the moral law, as well as the Fifth Amendment and, in effect, is an invitation to the Comptroller to abuse his power and render a bank insolvent, as illustrated in the instant case, by wasting and dissipating its assets and by the imposition of an impossible interest rate. Such a pronouncement would tend to encourage depositors to favor closing all solvent banks, as they would receive so much more than from a going bank. In Jackson County vs. U. S., 308 U. S. 352, this Court said that interest

> "is given in response to considerations of fairness, and is denied when its exaction would be inequitable."

In American Tobacco Co. vs. South Carolina National Bank, 15 F. Supp. 215 (1937) the Court allowed interest at 2 per cent. In American Ins. Co. vs. Lucas, 38 F Supp. 896, 925, the Court (Three Judges) held:

> "Interest will be allowed or denied 'in response to consideration of fairness.' "

In U. S. vs. Rodiek, 120 F. (2nd) 760, 761, the Court said:

> "* * * interest is recoverable only in response to consideration of fairness".

In Bank vs. Morgantheau, 66 App. D. C. 234, the Court allowed interest "*since the date when the receiver took*

possession of it'' in 1934, but Respondent is insisting upon interest during the Conservatorship of eleven months, though the Comptroller's office has held that no interest is due during the conservatorship, basing its opinion on Richmond vs. Church, 76 F. (2nd) 344. The cases here cited are not the same as the instant case, but they are cases of equitable jurisdiction and, therefore, the same controlling principles of equity apply

> ''Interest upon the principal sum from the date of default, at a fair rate, is the appropriate measure of damages for delay in payment of a sum due''. Royal Indemnity Co. vs. U. S., 85 L. Ed. 888.

WASTE. The report of the Receiver of March 31, 1937 (Ex. ''C'' R. p. 48) shows costs of liquidation $138,317.80
Present liquidation costs (R. p. 22) $235,000.00
An increase since the ''nuisance'' assessment suit in 1937 of ....$ 96,282.20
Add cash on hand $175,000.00
Total of $291,000.00
on hand in 1937 when the ''nuisance'' suit was brought or .....$ 66,957.64
more than the alleged claim for interest of.....$204,724.56

Petitioner will show that the liquidation was practically completed in 1937 and that this $96,282.20 was simply wasted to justify this ''nuisance'' suit. Further, Petitioner has charged the waste of approximately $50,000.00 as the result of gross negligence in failing to pay taxes and collect interest. Petitioner is not bound to disclose his evidence, but has furnished a list of a dozen or more improved pieces of real estate where this negligence occurred, in some instances totaling around $4,500.00, as in the case of 1937—3d St., N. W. Who should suffer for such waste as this?

That the former Comptroller could easily have paid all *proven claims* on or before Sept. 30, 1934, is shown by all

the reports of his Receiver. See affidavit (R. pp. 46, 47) and reports (R. pp. 48, 49). On April 23, 1934, the sum of $1,080,000.00 was borrowed from the R. F. C. (R. pp. 6 & 49) but was not distributed until June 28, 1934; that $775,000.00 was borrowed from the R. F. C. on March 31, 1935 (R. pp. 6 & 49) but was not distributed until Oct. 22, 1935, or a period of six months and twenty days, leaving a balance on hand of $281,846.96, after restoring $771,193.12 to the R. F. C., or easily enough to have paid *all* proven claims. Why borrow the money and hold it or restore it, without using it? Who should suffer for all this waste? We are unable to find any similar reported bank cases. As the cash and the assets were primarily for the depositors, it would seem their loss, as the Court of Appeals has already held that the Comptroller was immune and above the law so far as the stockholders are concerned. Cooper vs. O'Connor, *et al.* 69 App. D. C. 100 and Cooper vs. O'Connor, *et al.* 69 App. D. C. 108, contrary to our Constitution which limits immunity only to Senators and Representatives. If the stockholders and the bank can be made to suffer for all this neglect and waste, then the bank and the stockholders could be made to suffer for any amount dissipated and wasted on account of negligence or failure to convert the assets and make distribution, regardless of the amount involved.

ARBITRARY ACTS. When a bank is shown to be four times solvent, as here, it would seem to be a *prima facie* case of bad faith, without some explanation for its suspension. None is attempted in the instant case, not even a denial, but Respondent rests upon a motion to dismiss upon the ground that the facts and the acts set up showing that the bank was arbitrarily or fraudulently suspended are immaterial, irrelevant and *res adjudicata.* If this motion is treated as a demurrer, then Petitioner would be entitled to a judgment, as the motion or demurrer is an admission of the facts, except as to *res adjudicata.* But

as not a single fact was set up showing a trial upon its merits, the plea of *res adjudicata* must also fail. The arbitrary act which entitles Petitioner to relief, is the act of suspending the bank. Science has not yet developed a method of divulging or disclosing the thoughts of a man, except the Japanese, where the police arrest a citizen for thinking the wrong thing, and therefore, we must rely upon his words and his acts, in order to reach a fair conclusion of his intentions. If your Honors will take the time to read the substituted counter claim (R. pp. 3, 11) we do not think you will have any difficulty in reaching the conclusion that the intention of the former Comptroller was to wreck and destroy the Savings Bank in the instant case, knowing that it was perfectly solvent. (1) Why did he require $150,000.00 cash (new money) as a condition precedent to the opening of the bank when at the same time he was approving the sale of preferred stock and debentures to the extent of $574,000.00 by other banks? (2) Why did he permit other banks to defer or delay payments of as high as 65%, but refuse to permit this bank to open upon deferring only 35%? (3) Why did he permit other banks to open upon payment of 2% interest, but required this bank to pay 6%? (4) Why did he insist upon suit against the stockholders over the protest of his Receiver, Carter B. Keene, to the extent of a loss of $96,000.00? (5) Why did he refuse to follow the suggestion of his superior, the Secretary of the Treasury, to bring in a plan to open the bank? The substance of his answer was his animus toward Petitioner because of previous litigation. (6) Why did he refuse to distribute $775,000.00 cash on hand March 31, 1935, for over six months? Why did he refuse to pay all proven claims ($1,581,340.81) in full on March 31, 1935, instead of restoring $771,000.00 to the R. F. C., and in refusing to disburse $281,846.96 cash left over after restoring $771,000.00 to the R. F. C. (R. p. 48 Ex. "B"). He could have done this and still have left to restore to the R. F. C.

$498,579.42. (7) Why did he refuse to borrow on the assets or sell them at par and pay all proven claims promptly in July 1934, which he could have done? (Affidavit R. pp. 51, 52). We are now referring to the arbitrary refusal to liquidate the assets and pay all proven claims, (not solvency) which would have eliminated all or nearly all of the interest charge. The lower courts sustained the motion of Respondent to dismiss all these charges as immaterial, irrelevant and *res adjudicata*, though any one of them, unexplained, would convict the former Comptroller of being arbitrary.

RES ADJUDICATA. There has never been a trial of this case on its merits. None of the charges have ever been passed upon their merits at any time, and no such claim has even been made, though the lower Courts, contrary to all the authorities, sustained the motion to dismiss as *res adjudicata*.

> "* * * the plea is still open to the objection that it leaves to conjecture what was involved and decided in the former suit and is, therefore, insufficient to show estoppel by record." (Whitaker vs. Davis, 91 F. 721, citing Russell v. Place, (94 U. S. 606, 610.)
>
> "* * * When new facts intervene (as here) before the second suit, furnishing a new basis for the claims and defenses of the parties respectively, the issue is no longer the same, and consequently the former judgment cannot be applied in bar." (24 A. & E. Enc., p. 829.)
>
> "The estoppel of a judgment extends only to the facts as they were at the trial when judgment was rendered." *(Id.)*
>
> "Nor can such effect (*res adjudicata*) be given to a judgment where the court undertakes to decide a question (as here) not raised by the pleadings or submitted by the parties." (C. J., Vol. 34, p. 768.)
>
> "The decree, not being on the merits, could not be a bar to such subsequent suit in a State or United States Court." (Swift v. McPherson, 232 U. S. 504.)
>
> "Specific facts must be alleged to show the consideration and determination upon the merits." (23 Cyc. of Law & Prac., citing numerous authorities.)

"* * * There can be and ought to be no repose of society where for such wrongs the Courts are incapable of giving redress * * *," Graver v. Faurot, 76 F. 263.

"These and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and amend the former judgment or decree, and open the case for a new trial and a fair hearing." U. S. v. Throckmorton, 98 U. S. 95, citing authorities.

Petitioner set up the facts showing arbitrary action and in his prayer, asked the Court, upon a trial by jury, to declare that the Bank was arbitrarily and fraudulently suspended. The Bank had capital and surplus of about $350,000 on Sept. 30, 1932 (R. p. 38).

Mr. Justice Bailey of the District Court in the case of McKinley High School Bank, *et al.*, vs. Preston Delano, *et al.*, Civil Action No. 17348, an action brought by a number of depositors to prevent the Comptroller from paying some depositors 3% and others 12% as the result of an alleged agreement, upon a motion to dismiss a cross complaint by this Petitioner, sustained the motion to dismiss upon the ground that the question had become "moot" (The Court of Appeals had set aside the alleged agreement.) in Cooper vs. Goldsmith, *et al.*, decided May 20, 1943, and, also held that "the matters of fraud charged were not extrinsic to the suit", and that the remaining relief sought was *res adjudicata* in Cooper vs. Woodin, *et al.*, 63 App. D. C. 311, and Bank vs. Morgenthau, 66 App. D. C. 234, though not a single fact charged was ever in issue in either of the cases (R. p. 9) to which reference was made by Mr. Justice Bailey, and no such claim ever made. The question in the McKinley High School case *had* become moot in the case of Cooper vs. Goldsmith, *et al.*, 77 App. D. C. 392 (1943) 138 Fed. (2nd) 1931 but to hold that the facts charged showing arbitrary action were *res adjudicata*, was simply contrary to the facts, as the records show, and contrary to the law,

as already shown. Neither of the cases were ever tried on the merits, and *none* of the facts set up in the instant case were in issue in the cases referred to by Mr. Justice Bailey. This order is not binding on anyone in any case, except that particular case, as not a single fact was passed upon and none alleged to have been, as the authorities require, though respondent relied upon that order to sustain his *res adjudicata* motion. This action of Mr. Justice Bailey was simply Judicial tyranny or Judicial sabotage, just as his action was ten years ago, when he permitted the destruction of the bank in the face of the record showing that it was sound and solvent, though some of the assets were slow, like real estate notes.

Mr. Justice Bailey referred to the Cross Complaint in the McKinley High School Bank case, *supra*, as a bill of review, when it should be treated as an original bill.

> "The jurisdiction of Courts of Equity to reopen and set aside former decrees on the ground of accident, mistake and surprise is well recognized and frequently invoked * * *." (Dewey v. Stratton, 114 F. 185 (5th Circuit).)
>
> "A species of fraud frequently regarded as sufficient for equitable relief is misrepresentation." (39 Am. Jur. 670.)

Petitioner charges misrepresentation in Bank v. Morgenthau, *Supra*, No. 6605 (R. pp. 8, 9).

> "An *original bill* in the nature of a bill of review to set aside for fraud a decree entered on a mandate from the circuit Court of Appeals, may be filed *without* first obtaining leave of such Court," (Richie v. Burke, 109 F. 16, citing Story's Equity Pleading and Daniel's Chancery Pleading and Practice.)
>
> "* * * but such relief (Motion or bill of review) is not always adequate, and an *original bill* is a proper mode of seeking redress against a decree obtained by fraud or collusion or through mistake, accident or surprise." (Cyc. of Proc., Vol. 4, p. 342.)

See also King vs. West Va., 216 U. S. 92; Remington vs. C. P. R. R. Co., 198 U. S. 95, 99, 111; Gr. Western Tel. Co.

vs. Burnham, 162 U. S. 339, 343. The books are full of cases sustaining the right of petitioner to maintain a new suit "to set aside and amend the former judgment or decree, and to open the case for a new trial or a fair hearing", as stated in U. S. vs. Throckmorten, 98 U. S. 95.

We have here anticipated the brief of respondent, hoping to avoid the filing of a reply brief.

DUE PROCESS. The hearing of the motions in this cause was really a "farce" from every standpoint. The respondent relied upon the order of Mr. Justice Bailey as to *res adjudicata* in the case of McKinley High School Bank, *et al.* vs. Delano, *et al.*, Civil Action No. 17,348 and also upon his volunteer opinion as to the interest rate, in that case, to which we have already referred. Mr. Justice Letts had already refused to permit certain depositors to intervene by petition for a settlement (R. p. 2). He had already ordered the bank building sold, over the protest of this Petitioner, without waiting for a trial of this case (R. p. 51), regardless of the income from the building. He did not mention the opinion of Mr. Justice Bailey in his decision, though he followed it. It would have been stupid to expect him to hold otherwise. He objected to the length of the counter-claim, and, in deference to him, petitioner got permission to withdraw the original and file a substitute counter-claim (R. p. 3). There is no question but that Mr. Justice Letts determined to do exactly what he did do, long prior to the hearing, for certainly he would not have sold the Bank Building, unless he had so determined, for otherwise the sale would not have been necessary. He refused a jury trial as demanded. There was no evidence at all of damages except 1% (R. p. 55). The hearing was simply a "farce" and in violation of the due process clause of the Fifth Amendment.

CONTRACTUAL OBLIGATIONS. Petitioner has already shown what the law of the District was regarding the rate of interest to be paid (see sections 28-2701 and

28-2707 of the D. C. Code of 1940, *supra)*. The agreements entered into with the depositors, conformed to, or complied with, the provisions of these two sections in every way as already explained, and being a valid contract, any modification or alteration of same, whether by Judicial Legislation or otherwise, would be in violation of Article 1, Sec. 10, clause 6 of the Constitution of the United States, prohibiting the impairment of the obligation of contracts. This is too plain for extended discussion. The lower Courts were in error in seeking to alter or modify the contracts to conform to the laws of Oregon or New Jersey, as the District law admittedly controls (R. p. 18).

EQUITY UNFETTERED. Judge McColloch, it is claimed by Respondent, in the case of Elliott vs. Bank (Oregon), 32 F. Supp. 839 said:

> "Equity unfettered, might arrive at a different result, in view of the greatly reduced interest rates of current times, but, as said, the question is controlled by statute and judicial interpretation of long standing."

Equity *is* "unfettered" here. We have already shown that no interest is due, except by contract. (See R. R. Co. vs. Harman, 147 U. S. 290, *supra)* and that the contract with the demand depositors provided that no interest should be paid, but with the savings depositors 3% was to be paid. We are not acquainted with the laws of Oregon, but think that we have already shown that Equity is "unfettered" and has concurrent jurisdiction to intervene and prevent an injustice to any one.

RATABLE DIVIDEND. A "ratable dividend" in the National Bank Act plainly refers to principal and not to interest, as urged by Respondent, as the paradoxical situation of an *insolvent bank* ever being able to pay interest was not even dreamed about by the Congress of 1878 when the National Bank Act was passed. This preposterous and paradoxical situation was created as the result of the fertile imagination of a member of this Court long ago, and

in persuading this Court to hold that the word of the Comptroller was the law, right or wrong, unless infected with bad faith, this latter holding being necessary to maintain the paradoxical and illogical holding that an insolvent bank could pay interest. This is a good time to correct that preposterous performance. (But here the District law controls, passed in 1901, long after the National Bank Act of 1878.) A simple reading of the Statute will show that a "ratable dividend" is to be made "on all such claims as may have been proved to his satisfaction" (12 U. S. C. A. Sec. 194). There was no thought of interest at the time. In addition to the National Bank Act (12 U. S. C. A. Sec. 194) showing that there was no thought of such a preposterous proposition that an insolvent bank could pay interest, Sec. 371 b. of the Federal Reserve Law as printed in the 1934 Ed. of the U. S. Code (large red volume) specifically declares that the Federal Reserve Board shall limit the rate of interest on

> "time and savings deposits having different maturities or subject to different conditions * * * by reason of different locations."

all of which shows that there cannot be an unbending and unyielding rule or law, on account of different conditions and different interest rates in different locations in a large and growing Country. This Court would render a great public service by laying down some fair and equitable rule regarding the payment of interest by banks in receivership (if interest *must* be paid) similar to the rules of the Federal Reserve Board. For the taking of the property of one citizen and transferring it to another citizen, as interest in the nature of damages, without a line or a word of proof, as in the instant case, to support or sustain such a judgment, especially six times the prevailing rate or six times the amount of damages that could possibly be proven (R. p. 55) is clearly discriminatory and confiscatory, and contrary to the due process clause of the Fifth Amendment, as well as to Magna Charta and every principle of

natural justice. The depositors in this instance, if called upon, would affirm the above statement.

Petitioner offered to pay 4% to all depositors, as a settlement, or double the prevailing local rate (R. p. 55) but the Comptroller's office insisted that 3% was sufficient, until the canvass was completed, then the Comptroller's office insisted upon 12% to all those depositors who could not be found or had not agreed, which certain depositors and this Petitioner opposed. (Cooper vs. Goldsmith, *et al.*, 77 App. D. C. p. 392 (1943); 138 Fed. (2nd) 931.) The Court of Appeals sustained our position and set the alleged agreements aside. The Court of Appeals has held, contrary to our Constitution, that the Comptroller and all other Officials are immune and above the law, whereas Sec. 20 of the Criminal Code specifically declares that if any person "under color of law" deprives any citizen of his constitutional rights, such person shall be punished, etc. There is also a section in the Criminal Code (Sec. 19) providing severe punishment (ten years) for persons conspiring against a citizen of the United States. The Baker County, Georgia, offenders recently before this Court for the killing of the young colored man may be guilty under both sections. But the point is, that our Court of Appeals has gone squarely against the spirit of both of the above statutes in granting immunity to all our U. S. Officials as stated in Cooper vs. O'Connor, *et al.*, 69 App. D. C. 100 and Cooper vs. O'Connor, *et al.*, 69 App. D. C. 108. According to our Court of Appeals persons (officials) conspiring to destroy your property are above the law and cannot be held liable for damages, though Sec. 19 subjects the same conspirators to ten years imprisonment and a $5,000.00 fine. This is not a very pleasant condition to contemplate. Such pronouncements are calculated to sink our laws into a vortex of insufferable nonsense, as is well illustrated in the instant case wherein the lower Court held that your Petitioner was *estopped* to rely upon *ultra vires* acts, though the same Court held ex-

actly to the contrary in the case of Thompson vs. Park Savings Bank, 68 App. D. C. 276 and Dunn vs. O'Connor, *et al.* (1937) 67 App. D. C. 83 to which we have already referred. If the citizen cannot hold the offending official liable for damages, and cannot prevent the waste and destruction of his property by some legal or equitable process, then the rights of the citizen are at an end in this Country, and we are operating under a government of men and not of law. And if this Court or the lower Courts can, by judicial fiat, without a line of evidence to justify it, (as here) arbitrarily increase the amount of compensatory damages (1 per cent) to six times the actual amount proven, or from $1,000.00 to $6,000.00, then the Courts could arbitrarily increase the amount to six times six, both increases, however, being confiscatory, and in violation of the due process clause of the Fifth Amendment. The measure of damages, if any, is either (a) according to the contracts for interest or (b) according to the amount proven. However, we think that owing to the importance of the question this Court should intervene and lay down a fair and just rule, as the Federal Reserve Board is required to do. In the instant case some of the large accounts ($25,000.00 to $50,000.00) would realize two, three, four, five and some as high as $6,000.00, or six times the actual amount of damages sustained under the present prevailing rate of one per cent interest. Would this Court entertain for a moment the idea of arbitrarily increasing six times the amount of damages proven in any other breach of contract case? Certainly not. Then why permit such a confiscation in any bank case, whether the bank is solvent or insolvent? We feel sure that your Honors will all approve without division, of the statement of Mr. Justice Jackson in the Jewel Ridge Coal case that "Power should answer to reason none the less because its fiat is beyond appeal."

Are Banks to be penalized because they were solvent and able to pay dividends? This seems to be the view of op-

posing Counsel, though we must aquit both Comptroller Delano and Receiver Parsons of any such views for they only desire a fair and equitable rate paid, the penalizing idea having its origin elsewhere.

INSOLVENCY. Banks are regarded as insolvent only when unable to meet their *regular* or *usual* demands, but not so in case of a "run" or as the result of acts beyond their control or the acts of God, such as a world wide depression (as here) or similar conditions. In case of a "run" the only sensible thing to do is to put on restrictions, as we did, until the excitement is over, which requires only a few days. The Congress confirmed our action in March, 1933 in enacting a law authorizing the Comptroller to put on restrictions when necessary. (Act of March, 1933). Banks rarely, if ever, close, if withdrawals are restricted. Petitioner had a little stock in a small bank in Maryland that restricted withdrawals, in March, 1933 to 2%, but the excitement soon passed, and that bank is today doing a fine business and easily earning 50 per cent on its capital stock of $25,000.00.

> "A bank is solvent when it has enough assets to pay within a reasonable time, all of its liabilities through its own agencies, although it does not have cash sufficient for its daily needs," (9 C. J. S. 493, Sec. 485, Citing numerous authorities including State and Federal Courts.

CUMULATIVE EVIDENCE. All banks were, more or less, non-liquid and unable to realize 100 per cent on their assets for some time, before and after March, 1933, but that does not justify arbitrarily penalizing them as such an unfair and unreasonable amount as sought here, when the bank was four times solvent. Counsel for Respondent have endeavored to build their case on prejudice because of solvency, because of ability to pay dividends, because of restrictions to save the bank and because of money wasted by the previous Receiver ($96,000.) since the "nuisance"

assessment suit was brought (blaming petitioner) the Receiver having on hand at that time $66,000. in good assets in excess of the amount needed to pay the $204,000.00 of interest or excess damages claimed (R. p. 48), but they forget that the stockholders denied themselves dividends to the extent of twenty times the amount required by law for surplus. The evidence that the savings bank was arbitrarily destroyed is cumulative. If this Court will take Judicial notice of Misc. 40, Vol. 1 & Vol. 2 of the District Court, it will find that 10 or 12 petitions per day were filed almost daily for some time by Counsel for the Receiver for the purpose of exchanging good 6 per cent real estate notes for 3% Home Owners Loan bonds; that instead of combining them all into one petition, as they should, a separate petition was filed for each and an exorbitant and indefensible fee paid in order to destroy the bank by dissipating its assets, as Counsel have received around $50,000.00 for alleged services for this small institution. (The General Counsel for the Comptroller did practically all the work in previous litigation with Petitioner.) One petition to sell or exchange assets was all that was necessary. The Receiver and his assistant were both competent attorneys for this class of work and certainly could have drawn all necessary orders. Vol. 1 is a thick heavy volume filled with these petitions and orders, which any stenographer could copy. We cannot discuss other acts not of record. Neither Mr. Justice Bailey nor Mr. Justice Letts ever intervened to stop this waste, though they were constantly signing orders. Both these Judges have uniformly been nice and courteous to Petitioner, but this is a matter that should not be covered up in the arbitrary manner indicated. Lord Bacon said that he "appreciated the noble manner of the presentation more than the matter" when the Earl of Essex presented him a country estate near Twickenham. But this is in reverse,

Conclusion.

We regret the length of this brief, but Respondent raised numerous questions, which we thought proper to answer.

We have the concurring opinion of opposing Counsel as to *ultra vires* acts as expressed in Thompson vs. Park Savings Bank in our Court of Appeals, October term 1934, No. 6328, p. 68, wherein they say:

> "* * * that irrespective of Statute, the general rule of law requires an accounting from directors who have continued a business subsequent to the expiration of the Charter life and corporate existence of a corporation, and that the overwhelming weight of Federal and State authorities charge individuals who conduct an entire business *ultra vires* of the corporate powers with individual and personal liability for all obligations thereby created."

These gentlemen now join the lower Court in changing the law to fit the occasion.

The depositors had a right to set up a resulting trust in the assets wherever found, but cannot hold the bank liable for interest or acts subsequent to the prohibitory act passed. As there is no evidence whatever to sustain the action of the lower Courts, not even a finding of fact as to any damages, by the District Court, it would seem that the case should be reversed (a) as to *ultra vires* acts or (b) with instructions to either hear proof as to damages or (c) stand by the contracts entered into as to the rate of interest, if any, to be paid, according to the law, and order a trial on its merits if desired by either party, unless this Court will fix a fair and just rate. This litigation should be ended, but it should be ended according to law or the rules of Equity and justice.

The lower Courts should not be permitted to make a hollow mockery of justice in order to cover up the lawless acts of public officials.

Speaking of the basic rules that govern human society, Pope Pius XII in his remarkable Christmas message in 1943, made this observation:

> "They can be denied, overlooked, despised, transgressed, but they can never be overthrown with legal validity."

We think it was Thomas Jefferson who said that "Power feeds upon Power".

Our Constitutional guaranties should remain inviolate. Socrates had such profound respect for the law that he refused an opportunity to escape just before he drank the hemlock. Resistance to tyranny is obedience to God.

Respectfully submitted,

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